

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Debt Adjustment and Credit Counseling
High-Cost Home Loan Credit Counselors

Adopted Amendments: N.J.A.C. 3:25-1.1, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2 and 3.3.

Adopted New Rules: N.J.A.C. 3:25-4

Proposed: September 15, 2003 at 35 N.J.R. 4187(a)

Adopted: January 22, 2004 by Holly Bakke, Commissioner, Department of Banking and Insurance

Filed: January 22, 2004 as R. 2004 d.81, with substantive changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3)

Authority: N.J.S.A. 17:1-8, 8.1 and 15e, 17:9A-8.1 et seq. and 46:10B-22 et seq.

Effective Date: February 17, 2004

Expiration Date: January 7, 2008

Summary of Public Comments and Agency Responses: The Department received timely comments from

1. Paramount Mortgage Services, Inc.;
2. First Consumer Mortgage, Inc.;
3. David A. Tallman of Thacher Proffitt & Wood LLP;
4. Dina Shaloh; and
5. New Jersey Citizen Action.

Comment: One commenter stated that on the effective date of the New Jersey Home Ownership Security Act of 2002, they will suspend business in the State of New Jersey pending anticipated

revision of the Act and will focus on lending mortgage money to borrowers in other states. The commenter states that he has spoken to several investors to whom they sell paper and have been verbally advised that "in all likelihood they will withdraw from the New Jersey market with the enforcement of the Act because of the risks involved." He further states that they as a lender will not be required to address the counseling feature since it is not possible to close a high-cost home loan in New Jersey when there is no secondary market to which to sell and transfer them. He urges the Legislature and the Department of Banking to investigate the ramifications of the predatory lending act previously enacted in Georgia and subsequently changed in response to a class-action suit.

Another commenter stated that preparation of the regulations regarding certification of counselors for borrowers on certain high-cost home loans, while required by the Act, will be an exercise in futility and may be meaningless if lenders refuse to make high-cost home loans because of the provisions of the Act. They also state that since they do not hold high-cost home loans in their portfolio and, to their knowledge, there is no secondary market for these loans, they will not make a high-cost loan. They are of the opinion that reading the regulations is a waste of time since high-cost home loans will not be made in New Jersey.

Response: The specific concerns expressed in the comments are beyond the scope of the proposal. While the Department strives to ensure that the credit needs of all New Jersey's citizens are met, the Department must enforce laws in effect. The Department has been and will be carefully monitoring the mortgage market now that the Act is effective.

The Department regrets that some lenders did or may suspend certain types of business in New Jersey subsequent to the effective date of the Act. However, the Department's analysis, based on 2002 figures, indicates that a relatively small percentage of loans will be significantly

affected by the Act. In addition, the Department is aware of many lenders who will continue to offer loans in New Jersey and the Department believes that the market share of those who have suspended or may suspend certain types of business in New Jersey may be assumed by the lenders who continue to offer loans.

Comment: One commenter stated that they are one of many homeowners who are getting hurt as a result of this law and that the law will result in escalating rent rates and declining values of houses. The commenter asked for further information including a solution on how to buy a house or refinance with FICO scores in the 500s.

Response: The issues raised by the commenter - rent levels and housing values - while beyond the scope of this proposal, are among the issues the Department may consider as it analyzes the impact of the Act.

While the Act and the rules protect consumers with less than perfect credit from predatory lenders, the Department believes that sub-prime financing will still be available. A similar law enacted in North Carolina resulted in increasing loans to borrowers with impaired credit by 31 percent. In addition, New Jersey mortgage rates averaged 9.37 percent (APR) for FICO scores between 500-559 as of December 4, 2003. This is far below the rate/APR associated with the high cost rates in the new law.

Comment: One commenter, an attorney, asked for a clarification of the statutory provision which states that the Act applies to loans "secured by a mortgage or deed of trust on real estate located in New Jersey upon which there is located or to be located a structure designed principally for occupancy by 1-4 families, that is or will be occupied by a borrower as the

borrower's principal residence; or secured by a security interest in a manufactured home that is or will be occupied by a borrower as the borrower's principal residence." The commenter questioned whether the definition would cover loans secured by shares in a co-op arrangement, or by a mortgage on a condominium, or a mixed-use property where the property is used both as the borrower's principal residence and as an income-generating concern.

Response: The commenter is mistaken regarding the occupancy range applicable to the Act. The Act applies to loans secured by structures containing one to six dwelling units, not one to four.

The provision referred to in the comment would cover loans secured by shares in co-op arrangements, or by a mortgage on a condominium, or a mixed-use property where the property is the borrower's principal residence are subject to the Act and the rules. This is consistent with the treatment of such property in the Horizontal Property Act, N.J.S.A. 46:8A-1 et seq., and the Condominium Law, N.J.S.A. 46:8B-1 et seq.

Comment: One commenter stated that it has a major concern with regard to the loan counseling referenced in the rules. The concern is that, while the rule states that a credit counseling agency may make arrangements for funding by high-cost lenders, that is not a requirement, and loan counseling agencies might encounter difficulty funding the loan counseling sessions. In the same vein, the commenter objected that no requirements were placed on lenders to provide funding for, or other support in, the counseling process.

Response: The Act is silent with regard to the issue of reimbursement for counseling sessions. In the absence of specific legislative authorization and guidance, the Department did not limit fees charged by counselors, nor impose the responsibility of paying these fees on lenders. As a

result, counselors are free to negotiate regarding fees for counseling sessions. It should be noted, however, that the Department has prohibited a credit counselor and lender from having a financial relationship due to concerns regarding actual or potential conflicts of interest.

Comment: One commenter stated that debt adjusters should not be considered loan counselors under the regulations.

Response: For a debt adjustment agency to operate as a high-cost home loan credit counselor, it must be a non-affiliated third party non-profit credit counseling agency approved by the United States Department of Housing and Urban Development and must be registered by the Department as a high-cost home loan credit counselor. Thus, if a debt adjustment agency qualifies for registration as a high-cost home loan credit counselor, it is not excluded from being a high-cost home loan credit counselor if it meets all the criteria that any other counseling agency must meet. Because of their experience advising clients regarding loan products, the Department believes that qualified licensed debt adjusters and credit counselors can and will provide competent counseling service as envisioned by the Act.

Comment: One commenter questioned the language in the definition of "non-affiliated third party agency." They found the language ambiguous and penal to loan counseling agencies with relationships with banks that may also have high-cost lending arms not directly related to their loan counseling activities or relationships.

Response: The Department does not believe the language in the definition is ambiguous and believes that, as is referenced in that definition, it is necessary that high-cost home loan credit counselors be independent of lenders and others who seek to derive profit or gain from the

counseling services. Furthermore, so long as the financial or contractual relationship between a counseling agency and a lender does not involve the lender deriving a profit or gain from the counseling services and does not result in the agency being directly or indirectly under the influence, control or direction of the lender, or any of its directors, principal officers, or shareholders, such a relationship would not render the agency “affiliated” with the lender as that term is defined at N.J.A.C. 3:25-1.1.

Comment: One commenter objected to the language that allows the Commissioner to make further "unspecified" inquiries on an application form. The same commenter objected to the requirement that the agency inform the Department of any license or permit suspension or revocation for any director, trustee or member of an advisory board.

Response: The text to which the commenter objects allows the Commissioner to gather such information as may be necessary to properly evaluate a particular application and make a fully informed judgement. The Department believes that, in order to protect borrowers in New Jersey as well as preserve the safety and soundness of the entities it regulates, such information is necessary.

The Department notes that once an entity is registered, the Department has access to all documents through its investigation and examination power.

Comment: One commenter objected to the fee structure, stating that Statewide non-profit agencies with multiple offices would be penalized for serving a broader range of the New Jersey population because of the \$25.00 fee for each additional loan counseling office.

Response: The Department does not believe that the fee is burdensome to agencies with multiple offices. The fee is based on the recordkeeping costs to the Department.

Comment: One commenter objected to the provision allowing the Department to revoke, suspend or refuse registration based on convictions of directors, officers or employees of loan counseling agencies, or if the agency violated the New Jersey Homeownership Security Act of 2002.

Response: The Department believes that such provisions are necessary to protect New Jersey consumers and to ensure the quality of high-cost home loan counseling that is being offered. The Department, however, continues to be subject to the Rehabilitated Offenders Act, N.J.S.A. 2A:1.68A-1 et seq., in making decisions on registration applications.

Comment: One commenter objected to the "ninety-day window after alternate counseling." The commenter believed that borrowers should be required to receive counseling for every high-cost home loan.

Response: The Department disagrees with the commenter. The 90 certification requires that general counseling be given in accordance with criteria set forth in the rules and thereby educate the consumer generally regarding high-cost home loans. This allows borrowers who have been educated to shop for the best loan terms for ninety days without having to acquire further certification. Borrowers who desire additional counseling on a particular loan are free to secure it at any time.

Comment: One commenter suggested additions to the rules which included: 1) a requirement that the lender provide the loan counseling agency with their underwriting package at the time clients are referred, so that the counselor has accurate documentation in a timely fashion; 2) a standardized loan counseling certificate listing topics and requirements for loan counseling agencies; 3) a standardized loan counseling form in which the counselor shows the borrower their exact costs and the costs under a conventional product for their comparison; 4) language to address situations which may arise when the loan counseling agency is unable to provide the borrower with opportunities to seek other means of funding due to the borrower's credit history, and therefore exempt the agency from penalty if these opportunities are not presented to the borrower in such situations; and 5), because some loan counseling agencies may have relationships with banks that also offer high-cost home loans, allow the high-cost home loan counseling agency to make a formal declaration that it does not refer borrowers for high-cost loans and "therefore be secured from penalties under the legislation or Rules."

RESPONSE: The Department believes that the first suggestion, requiring lenders to provide their underwriting packages to the counseling agency, is beyond the scope of the counseling provision and would be burdensome upon lenders.

The Department has considered the data that is contained in underwriting packages and in the good faith estimates mentioned in N.J.A.C. 3:25-4.3(a)5 as proposed. Based upon that analysis, the Department has concluded that, in order to meet the objective of ensuring that "the consumer understands their obligations with regard to the prospective high-cost home loan" as referenced in N.J.A.C. 3:25-4.3(a)8, it is necessary to clarify the text of N.J.A.C. 3:25-4.3(a). Consequently, upon adoption, the Department has added text clarifying that the "good faith estimate" is the document required by Federal Regulation X (24 C.F.R. 3500.7). Text has also

been added indicating that the Truth in Lending Disclosure Statement required to be provided to prospective borrowers by Federal Regulation Z (12 C.F.R. Part 226) must also be reviewed by the counselor. Because the Truth in Lending Disclosure Statement reflects the terms of the loan being offered, as opposed to the costs and fees to be charged in connection with the loan which are addressed in the good faith estimate, it clearly constitutes “other documentation supplied by the lender which provides the minimum information concerning the prospective high-cost home loan necessary for certification” as is referenced in N.J.A.C. 3:25-4.3(a)5 as proposed. Adding text requiring that the Truth in Lending Disclosure Statement as well as the Good Faith Estimate be reviewed by the counselor is also consistent with N.J.A.C. 3:25-4.1(b), which requires that the certification issued by a high-cost home loan credit counselor include information on the terms of the prospective loan, as well as its points and fees.

In addition, should a lender issue a commitment on a high cost home loan prior to receipt of a certification confirming that the borrower has received the counseling required by N.J.S.A. 46:10B-26(g) with respect to the loan, such commitment would constitute “other informational documentation supplied by the lender” which, depending upon the breadth of the information contained therein, might provide the minimum information concerning the prospective high-cost home loan necessary for certification, as is referenced in N.J.A.C. 3:25-4.3(a)5. In the event that a lender contemplates the issuance of a commitment prior to receipt of the certification, the Department would consider it a good business practice for the lender to notify the borrower in writing, prior to charging a commitment fee, that the lender cannot make the high cost home loan where the points and fees in connection with the loan are financed until the counseling requirement imposed by N.J.S.A. 46:10B-26(g) has been satisfied.

In cases where a certification has not previously been issued, the Good Faith Estimate, Truth in Lending Disclosure Statement and, if available, the commitment should contain sufficient information needed by a high-cost home loan credit counselor to provide counseling on the loan in accordance with N.J.A.C. 3:25-4.3, without the lender being required to provide their “underwriting package” as suggested by the commenter. Should that not be the case, the counselor would have to, either directly or through the borrower, secure whatever additional information was needed from the lender in order to enable the counselor to issue a certification in accordance with N.J.A.C. 3:25-4.1.

The standardization of the counseling certification would be difficult to accomplish, due to the wide variety of loan products available. However, the Department will distribute via a bulletin and post on its website at www.dobi.state.nj.us a Department-approved certification form which registered high-cost home loan credit counselors may use. The Department will continue to monitor the effects of the Act and the rule, and may propose the use of a mandatory certification form in the future, should new data indicate a need to do so.

With regard to the suggestion requesting additional language addressing the situation where the agency is unable to provide information about other means of funding, N.J.A.C. 3:25-4.3(a)6 requires persons providing high-cost home loan credit counseling to “discuss with the consumer ... opportunities for the borrower to seek other means of funding.” If, due to the borrower's credit history, the counseling agency is unable to identify opportunities to seek other means of funding, it would still be able to comply with this requirement. The counseling agency could do so by discussing that information with the borrower and advising the borrower about how, if certain actions were taken to improve his or her credit history, opportunities for other means of funding might become available. By proceeding in this manner, the counseling agency

would have fulfilled the requirement to discuss opportunities to seek other means of funding with the borrower as part of the counseling service it provided to that consumer.

The suggestion to allow a high-cost home loan counseling agency which may have a relationship with a lender to make a formal declaration that it does not refer borrowers for high-cost loans, and "therefore be secured from penalties under the legislation or Rules," is rejected because of the potential for conflicts of interest.

The Department intends to monitor carefully the effect of the Act and these rules. If after doing so, the Department concludes that any further changes to the rules are needed, they will be proposed at a future date.

Summary of Agency-Initiated changes:

As proposed, N.J.A.C. 3:25-4.3(a) provided that, prior to providing a certification, persons providing high-cost home loan credit counseling shall "discuss" with consumers the information specified in paragraphs 1 through 8 of that subsection. Because certain documents are referenced in paragraph (a)5, the Department has revised the text of subsection (a) upon adoption to indicate that the counselors are required to "review", rather than merely "discuss," with the consumer the information and documents listed in that subsection.

In addition, because a balloon payment provision is a particularly significant term of any loan containing such a provision, upon adoption an explicit reference to such a provision has been added to the terms specifically listed in N.J.A.C. 3:25-4.3(a)3 that shall be reviewed by the counselor with the consumer. A similar addition is also being made to N.J.A.C. 3:25-4.4(c)4

with respect to the terms of hypothetical loans to be discussed with borrowers receiving alternate high-cost home loan credit counseling in accordance with that section.

Federal Standards Statement

A Federal standards analysis is not required because the new rules and amendments are not subject to any Federal requirements or standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

3:25-4.3 Minimum standards for certifications of high-cost home loan credit counseling.

(a) Prior to providing a certification in compliance with N.J.S.A. 46:10B-26(g), persons providing high-cost home loan credit counseling shall ***[discuss]* review** with the consumer the following:

1. – 2. (No change from proposal.)
3. The effect of the loan's terms, including its actual interest rate, annual percentage rate, points, fees *** any provision for a balloon payment** and prepayment penalties;
4. (No change from proposal.)
5. The ***Federal Regulation X** good faith estimate ***and Federal Regulation Z Truth in Lending Disclosure Statement**,* or other informational documentation supplied by the lender which provides the minimum information concerning the prospective high-cost home loan necessary for certification;
6. – 8. (No change from proposal.)

3:25-4.4 Certification of alternate high-cost home loan credit counseling

(a) – (b) (No change from proposal.)

(c) Prior to providing a certification of alternate counseling, an individual providing high-cost home loan credit counseling shall discuss with the consumer the following:

1. – 3. (No change from proposal.)

4. The effect of each loan's terms including interest rate, annual percentage rate, points, fees *, **any provision for a balloon payment*** and prepayment penalties;

5. – 8. (No change from proposal.)

(d) – (g). (No change from proposal.)

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